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State v. Svelmoe Appellant's Reply Brief Dckt. 43181

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, v. TROY MILES SVELMOE, Defendant/Appellant.	)	APPELLANT'S REPLY BRIEF SUPREME COURT NO. 43181 CR-14-0018684

APPELLANT'S REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE JOHN MITCHELL
District Judge

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II. Whether it is fundamentally fair to allow prosecutors to refile felony cases after they are dismissed at a preliminary hearing due to a lack of the very same evidence the prosecutor chose not to present at that hearing.

III. Whether the breath test results should have been excluded in this case because the state failed to lay a proper foundation.

IV. Whether there is an exception to the warrant requirement for breath testing in DUI investigations.

ARGUMENT

I.

A. The Magistrate Court's error is not moot.

The state argues in its response that the Magistrate's ruling that it could not hear the defendant's Motion to Dismiss was moot due to the fact that appellate courts only review the decisions of the District Court rather than the Magistrate's decision when the District Court is acting in an appellate capacity. State's Brief at 6 *citing State v. Dewitt*, 145 Idaho 709, 711 (Ct.App.2008). As the District Court never ruled in an appellate capacity in this case, the state's argument is wholly irrelevant. The District Court never considered whether the Magistrate Court had the ability to rule on such a Motion. Thus, this Court may review the Magistrate's decision for error.

B. The state cannot have the vast power to refile charges that it ascribes itself.

The state argues on appeal that a prosecutor who has lost at a preliminary hearing in a felony matter may refile any time the prosecutor did not present evidence available to the state during the first preliminary hearing but which the state chooses not to present. Brief of Respondent at 10. The state thus claims to have even more discretion to refile charges than what occurred in this case, where the prosecutor knew of other evidence, knew it to be unavailable, and chose to go forward without requesting a continuance. *See* Response to Defendant's Motion to Dismiss. Thus, the state reads *Stockwell v. State*, 98 Idaho 797 (1977), in the narrow fashion most courts ascribe it today: unless a judge is willing to find that the state is harassing, delaying, or forum-shopping the state may refile as many times as it wants. This cannot be the law.

The Court in *Stockwell* held that good faith was required for a refile. It held in *State v. Bacon*, 117Idaho 679, 684 (1990) that for a per se Due Process violation, one had to prove bad faith. The state combines these, despite the fact that the Court stated in *Bacon*:

> [T]he only limit to refiling a complaint is that it cannot be done without good cause **or** in bad faith. [emphasis added]

Id. at 687 *quoting State v. Ruiz*, 106 Idaho 336, 377 (1984). In *Bacon*, the Court found that the prosecutor properly refiled the charges after they failed to be bound over due to "technical inadequacies in the underlying misdemeanor DUI conviction rather than a lack of evidence or merit." *Id.* That is the opposite of what occurred in this case- here, the matter was dismissed for lack of evidence at the first hearing. *See*, Response to Defendant's Motion to Dismiss, p. 2. The evidence the state needed to present at that hearing was known to the prosecutor, however, only she knew it was not available, and chose to have the hearing without it. *See*, *id.* Thus, it is clear that this case is about a lack of good cause.

The state then argues that additional evidence is as the District Court ruled- any evidence it did not present previously. In other words, the state has no incentive to do a thorough presentation at a preliminary hearing. It may present as little as it wishes, and if that does not convince the Magistrate, then it can simply file the charges over again. While it may be true that Idaho has no statute or rule on the propriety of refiling, the practice still must contend with the fundamental fairness guaranteed by the Fourteenth Amendment of the United States Constitution and Art. I § 13 of the Idaho Constitution. *Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18, 24–25 (1981); *State v. Lewis*, 144 Idaho 64, 66 (2007). There is simply nothing at

all fair about a system that allows a prosecutor to do what no other litigant is allowed: to try and try again to meet its burden, regardless of concerns for the rights of the other party or the strain it places on the judicial branch, so long as it is not acting in bad faith. *See, J.I. Case Co. v. McDonald*, 76 Idaho 223, 231 (1955).

Moreover, this is not simply the ability to request a reconsideration. Because the law does require a Magistrate to dismiss a matter upon not finding probable cause, a defendant finds himself open to being reprosecuted, now having lost whatever credit for time he served, with all that entails, such as being rearrested. I.C. § 19-814; I.C.R. 4(c), 5.1(c).

In view of the interests in the balance already outlined on page 12 of the defendant's opening Brief, Due Process requires more from the state when it wishes to refile felony charges after failing to prove probable cause at a preliminary hearing than what it is advocating in these proceedings. This Court should so find.

II.

As the state points out, the Idaho Supreme Court issued its decision in *State v. Haynes*, 159 Idaho 36, 355 P.3d 1266 (2015) shortly after the defendant filed his briefing in this matter. The state makes two arguments, first that the Court's ruling in *Haynes* on the propriety of using the Standard Operating Procedures as the method to lay foundation under I.C. 18-8004(4) was dicta, and second that even if it was not, the defendant appealed from the denial of his Motion in Limine, rather than the actual entry of the breath testing evidence at trial.

First, the state's reading of the Court's holding in *Haynes's* that the Standard Operating Procedures are void as dictum is not supported by that opinion or *State v. Riendeau*, 159 Idaho

52, 355 P.3d 1282 (2015). The state never uses the word dictum in its brief, but argues that *Haynes* holding had nothing to do with the outcome in the case, which is precisely how Black's Law Dictionary defines dictum. *See* Brief of Respondent at 13, BLACK'S LAW DICTIONARY (Free Online Legal Dictionary 2nd Ed.) *available at* http://thelawdictionary.org/dictum/. The Idaho Supreme Court found in *Riendeau* that:

> In *State v. Haynes,* No. 41924–2014, — Idaho ——, 355 P.3d 1266, 2015 WL 4940664 (Idaho Aug. 20, 2015), this Court held that the 2013 SOPs were void because they were not adopted pursuant to the Administrative Procedure Act. *Id.* at ——, 355 P.3d at 1274–75, 2015 WL 4940664, at *8.

Riendeau, 355 P.3d at 1282. Thus, the Court has already found that the voidness of the Standard Operating Procedures was not dictum. In any case, the state continues to misunderstand the issue presented. I.C. 18-8004(4) permits the Idaho State Police to create a method that operates as a legal foundation at a criminal trial. Because such a method would be a rule as defined by IDAPA, it must be promulgated according to IDAPA. *See generally Haynes, Riendeau.* Since the Standard Operating Procedure offered by the state had not been properly promulgated, the District Court could not admit evidence of the breath testing in this matter pursuant to I.C. 18-8004(4). The District Court had to require the state to present the evidence through a forensic expert. *Id.*

Second, the state's argument as to the defendant's appealing from the wrong error fails for the same reason. In *Haynes* the Court found error in denying the defendant's Motion to exclude the breath testing if the state presented it pursuant to I.C. § 18-8004(4), but then found that error was harmless because no trial was held and the state might have proceeded by offering

the evidence through the Idaho Rule of Evidence. *See Haynes*, 355 P.3d at 1275. In *Riendeau*, the Court found error but found that the state had relied on an expert and thus the results were admissible on a different ground. *Riendeau*, 355 P.3d at 1282. The state would have this Court ignore that a Motion in Limine is simply an evidentiary objection made prior to trial, one that a defendant need not raise again during trial. *See State v. Hester*, 114 Idaho 688, 700 (1988) *citing Davidson v. Beco Corp.*, 112 Idaho 560 (Ct.App.1986). The District Court's error is not rendered harmless simply because at the time the Motion was made the state might have done something that it *in fact* did not do when the case was tried. Tr. p. 128-148. Had the District Court not erred but instead granted the defendant's Motion in Limine, then he would not have been tried on evidence that should not have been admitted. Therefore, this Court must reverse his conviction and remand for a new trial.

III.

The state argues that the Idaho Supreme Court held that consent to a breath test is not required when an officer has probable cause to believe someone has driven under the influence because a warrant is not required. Brief of Respondent at 21 *citing Haynes*, 355 P.3d at 1275-76. That ruling, however, is incorrect. The Court places too much weight on the minimal intrusion of the breath testing procedure as a reason to forego the warrant requirement. *See Haynes*, 355 P.3d at 1276. For there to be an exception to the warrant requirement, the United States Supreme Court has required that the state show reasons why getting a warrant would be impractical or unnecessary to further the aims of the warrant requirement. *Missouri v. McNeely*, __ U.S. __, 133 S.Ct. 1552, 1558 (2013); *Skinner v. Railway Labor Executives Association*, 489 U.S. 602,

619-20, 622 (1989). The United States Supreme Court reviewed the circumstances of a DUI investigation and found no reason to create an exception to the warrant requirement. *McNeely*, 133 S.Ct. at 1568. Thus, a warrant was required, and this Court should so find.

DATED this 3 day of November, 2015.

OFFICE OF THE KOOTENAI
COUNTY PUBLIC DEFENDER

BY: _____
JAY LOGSDON, ISB 8759
DEPUTY PUBLIC DEFENDER

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that I have this 5th day of November, 2015, served a true and correct copy of the attached APPELLANT'S REPLY BRIEF via interoffice mail or as otherwise indicated upon the parties as follows:

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